

**MINUTES OF
ADVISORY COMMITTEE ON RULES OF EVIDENCE**

Friday, September 17, 2021

Zoom-Only (link denoted on public agenda)

Website: <https://www.azcourts.gov/rules/Advisory-Committee-on-Rules-of-Evidence>

Members Present Virtually:

Hon. Sara Agne
Hon. Maria Elena Cruz
Hon. Darci Weede
Hon. Karl Eppich
Mr. Andrew Becke
Prof. Jessica Berch
Hon. Kellie Johnson
Hon. Doug Metcalf
Mr. Mikel Steinfeld
Hon. Danielle Viola
Mr. George Krauja

Members Not Present:

Hon. Monica Edelstein
Hon. John Napper
Mr. Randall Papetti
Mr. Bill Hughes

Quorum:

Yes

1. Call to Order

Judge Cruz called the meeting of the Committee (“ARE” or “the Committee”) to order at 10:01 a.m.

2. Approval of Minutes from Meeting of March 5, 2021

The minutes of the prior meeting noted above were approved by unanimous vote, without any changes, additions, or corrections, after a motion by Mr. Becke and a second by Mr. Steinfeld.

3. Report on Admin. Order 2021-142, “Policies for the Submission and Management of Exhibits Submitted Through the Digital Evidence Portal” and CaseLines

Judges Agne and Cruz discussed the Digital Evidence Portal project being piloted in Maricopa, Pima, and Mohave counties. Judge Agne discussed the policies set forth in the Administrative Order of the Arizona Supreme Court, and Judge Cruz noted that the appellate court is up and running on CaseLines as well. Judge Metcalf queried where the funding for the pilot project had

arisen, and the joint effort between the Administrative Office of the Courts and Thomson Reuters was discussed.

4. Update re Petition R-21-0020, which eliminated peremptory challenges in jury selection and other pertinent rule change petitions

Judge Cruz discussed how Arizona had recently become the first state in the nation to eliminate peremptory challenges in jury selection as a way of reducing to the greatest extent possible the role of improper bias in jury selection and by extension the role of improper bias by juries in the rendering of verdicts. Judge Weede queried how the rule changes would impact limited jurisdiction courts, and Judge Viola explained that we can expect clean-up rule amendments that will address that and other pending issues. Judge Viola also noted that she leads a Maricopa County workgroup on jury selection that works in tandem with the Arizona Supreme Court Task Force on Jury Data Collection, Practices, and Procedures, and invited members to send any Maricopa County-specific questions or comments her way.

5. Update on Proposal to Amend Fed. R. Evid. 615

Judge Johnson, chair of the Committee's Rule 615 subcommittee, provided an update on the federal proposal, which has now been published for public comment. Professor Berch stated that the three federal proposals published for public comment are not generally controversial, but she and Judge Metcalf both noted that Arizona's Rule 615 has a Rule 615(e) section that prohibits excluding "a victim of crime, as defined by applicable law, who wishes to be present during proceedings against the defendant." The federal rule does not have a corresponding exception, so changes to Arizona's rule will need to be made mindful of the difference. Judge Agne noted that public comments on the proposed changes to Rule 615, as well as public comments on the other proposed changes (Rules 702 and 106) are due no later than February 16, 2022, and a federal hearing will be held to take other public comment on January 21, 2022. The expected effective date for the federal rule changes is December 1, 2023, with Arizona corresponding changes then taking effect January 1, 2024. Judge Cruz reported that the members of the Rule 615 subcommittee, other than Judge Johnson—the subcommittee Chair, include Mr. Steinfeld, Judge Eppich, and Mr. Hughes; the subcommittee was appointed on December 6, 2019.

6. Update on Proposal to Amend Fed. R. Evid. 702

Prof. Berch, in place of Mr. Papetti (who had a hearing conflict), chair of the Committee's Rule 702 subcommittee, provided a detailed update on the federal proposal, which is among those published for public comment. Prof. Berch discussed the intent of the rule language to encourage fulsome exercise of the Rule 104(a) gatekeeping function by trial courts under Rule 702. A Rule 702 gatekeeping analysis is not 104(b) hands-off-type deference, not a matter of credibility and weight of the expert opinion evidence, but rather an intensive, hands-on 104(a) exercise to ensure that expert opinions reflect reliable applications of principles and methods to the facts of the cases. Prof. Berch noted that of the five public comments on the federal rule changes so far, a substantive one on Rule 702 was from Lawyers for Civil Justice, which supports the proposed changes.

7. Update on Proposal to Amend Fed. R. Evid. 106

Judge Agne discussed the federal rule change proposal to amend Rule 106, and the Committee appointed a Rule 106 subcommittee. Judge Metcalf will chair the Rule 106 Subcommittee, and its members include Judge Weede, Judge Viola, and George Krauja.

8. Other Items for Discussion: Latest Agenda Books of the Standing Committee on Rules of Practice and Procedure ([June 2021](#)), of the Advisory Committee on Evidence Rules ([April 2021](#)) & Discussion re Case Law Update

Judge Agne reviewed portions of the Latest Agenda Book of the Standing Committee on Rules of Practice and Procedure and of the Advisory Committee on Evidence Rules, including those regarding possible changes to Rules 615 and 1006. The federal Advisory Committee on Rules of Evidence will meet on November 5, 2021. Judge Agne thanked those who volunteered to summarize cases for the Evidence Case Law Update and noted that case summaries are due to Judge Agne by December 1, 2021.

9. Next Meeting

Judge Cruz reported that the next meeting is scheduled for 12/10/21, at which meeting the Committee will select its 2022 meeting dates. Meetings are presumed to be virtual at this time until further notice. Judge Metcalf noted for the good of the order that there were requests at the Judicial Conference for an Advanced Law of Evidence seminar, in addition to the traditional Law of Evidence Update sessions, and Judges Cruz and Agne noted that the Committee would propose such a session to the Judicial Conference Committee.

10. Call to the Public and Adjournment

Judge Cruz made a call to the public. No members of the public were present virtually, though the agenda, containing the link, was posted publicly in advance on the Committee's website. The meeting was adjourned at approximately 10:55 a.m.